Supreme Court, U. S.
FILED
NOV 7 1975

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1975

NO. 75-6804

DAVID KENT CAMPBELL, Lance Corporal, U. S. Marine Corps Reserve; JAMES E. CHORAK, Lance Corporal, U. S. Marine Corps Reserve; and HANK WOODBURN, Lance Corporal, U. S. Marine Corps Reserve, Petitioners,

vs.

MICHAEL J. BEAUGHLER, Captain, U. S. Marine Corps Reserve, Commanding Officer, Company D, 6th Engineering Battalion, FMF, U. S. Marine Corps Reserve, and the UNITED STATES OF AMERICA, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 23, 1975.

OPINIONS BELOW

The opinion of the United States District Court for the District of Arizona is unreported and a copy of that opinion is attached to this Petition as Appendix A. The opinion of the Court of Appeals for the Ninth Circuit is reported at 519 F.2d 1307 and is attached to this Petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 23, 1975. On September 19, 1975, Mr. Justice Douglas granted Petitioners an extension of time to and including

November 6, 1975, in which to file their Petition for Certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Marine Corps regulations and policies establishing maximum hair lengths for male marines and preventing use of short-hair wigs as a means of compliance deprive Marine Reservists, who spend over ninety-five per cent of their time in civilian life, of rights guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

2. Whether Marine Corps regulations and policies permitting female marines to have longer hair than male marines and permitting use of wigs to effect compliance with applicable regulations create an impermissible classification based

upon sex and deny male Marines the equal protection of the laws.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Number I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment Number IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment Number V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment Number IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment Number XIV:

"All persons born or naturalized in the United States,

and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1101, Paragraph 1-b, of the Marine Corps Personnel Manual:

"Hair shall be worn neatly and closely trimmed. It

shall be clipped at the sides and back so as to present an evenly graduated appearance. The hair on top must not be over three inches in length. Long or conspicuous sideburns are prohibited."

Section 1101, Paragraph 2, of the Marine Corps Personnel Manual:

"Women personnel shall be well groomed at all times and shall meet the following minimum standards:

a. The hair shall be neatly shaped and arranged in an attractive, feminine style. Elaborate hairstyles that do not allow for

the proper wearing of the cap are prohibited. Hair may touch the collar but may not fall below the collar's lower edge. . . . Wigs, if worn in uniform, must look natural and conform to all of the above listed regulations."

STATEMENT OF THE CASE

Petitioners, Lance Corporals in the Marine Corps Ready Reserve, are required to attend monthly drills the first weekend of each month and to attend annual summer camps of a two-week duration. As members of the Ready Reserve, they are subject to the general Marine Corps regulations regarding hair length and non-

compliance may be treated as a failure to satisfy the attendance requirements. For such failure, Appellants may be ordered to perform additional active duty training of up to 45 days, 10 U.S.C. § 207(b), and, in addition, may be ordered to active duty for a period of two years. 10 U.S.C. § 673(a).

Section 1101, Paragraph 1-b, of the Marine Corps Personnel Manual establishes the maximum permissible length of hair for all male Marines and provides:

> "Hair shall be worn neatly and closely trimmed. It shall be clipped at the sides and back so as to present an evenly graduated appearance. The hair on top must not be over three inches in length. Long or conspicuous sideburns are prohibited."

The analogous regulation applicable to female members of the Marine Corps, Section 1101, Paragraph 2, of the Marine Corps Personnel Manual, permits much longer hair and allows female Marines to comply with the requirements through the use of wigs. This regulation states in relevant part:

> "Women personnel shall be well groomed at all times and shall meet the following minimum standards:
>
> a. The hair shall be neatly shaped and arranged in an attractive, feminine style. Elaborate hairstyles that do not allow for the proper wearing of the cap are prohibited.

> Hair may touch the collar but may not fall below the collar's lower edge. . . . Wigs, if worn in uniform, must look natural and conform to all of the above listed regulations."

The enforcement of these regulations has been highly controversial. Respondent Beaughler, the commanding officer of Petitioners' reserve unit, and those acting under his direction, supervision and control have disciplined and otherwise penalized members of Petitioners' reserve unit because of the length and style of their hair and because they elected to wear short-hair wigs in order to comply with the hair-length regula-

tions. Indeed, Beaughler and/or those acting under his direction, supervision and control have assaulted members of Petitioners' reserve unit by forcibly and without consent cutting the hair of those who have attended reserve meetings with hair which was deemed by them to be unacceptably long or stylish. Petitioners and other members of their reserve unit were therefore faced with the uncomfortable choice of either sacrificing their personal liberty for the sake of the relatively small amount of their time spent as Reservists or undergoing the even greater loss of liberty attendant to involuntary activation.

On November 29, 1972, Petitioners filed a Complaint for a Temporary Restraining Order and a mandatory injunction against the enforcement of Marine Corps Regulations §1101 ¶¶ 1-6. Petitioners argued that they were being deprived of their constitutional rights without proper justification and that they were discriminated against on the basis of their sex. At that time Petitioners received a Temporary Restraining Order which prohibited Respondent Beaughler from "[h]arrassing, insulting, demeaning, bringing ridicule upon, assaulting, battering, disciplining or penalizing in any way whatsoever any person within Company D, 6th Engineering Battalion, FMF, Fortps, U. S. Marine Corps Reserves, in whole or in part because of the length of his hair or because he may choose to wear a short-hair wig. . . ."

Respondents then moved for summary judgment and to quash the Temporary Restraining Order, arguing that the District Court was without jurisdiction, and that, in any event, the hair-length regu-

lations were within the discretion of military authority and did not constitute an impermissible classification based upon sex. Respondents' Motion was supported by Affidavits which controverted Petitioners' verified Complaint and which purported to advance military justifications for the prohibition of short-hair wigs and the regulations governing the hair length of male Marine Reservists. Petitioners then filed a Motion for Preliminary Injunction and for Partial Summary Judgment as to the requested declaratory relief, arguing, in part, that the regulations constituted an impermissible classification based upon sex. Petitioners' Motion was supported by Affidavits which demonstrated that the Marine Corps hair regulations were not supported by any legitimate military interest. While the cross-motions were

under advisement, the Marine Corps amended its regulations to allow the wearing of short-hair wigs to weekend drills but continued the ban on wigs at summer camp.[1/]

The matters came on regularly for hearing before the United States District Court for the District of Arizona.

[1/] The modification of the regulation to allow the wearing of short-hair wigs to weekend drill meetings has not relieved Petitioners from the harassment and threat of activation of which they originally complained. Notwithstanding the modification of the regulations and a partial stay issued by the District Court, Petitioners were disciplined for wearing wigs to the weekend drills by being arbitrarily given unsatisfactory ratings for the drills. Unsatisfactory ratings can result in Petitioners being involuntarily forced into active duty. Because of this continued harassment and the threat of activation, Petitioners sought a stay from the District Court. This stay was granted as to the weekend drills; it was, however, later narrowed and then vacated. Subsequent stay requests were denied by the Court of Appeals for the Ninth Circuit and by this Court.

This case, therefore, presents a live and continuing controversy.

Determining first that it had jurisdiction over the subject matter pursuant to 28 U.S.C. § 1331(a)[2/], the Court granted Respondents' Motion for Summary Judgment and denied Petitioners' Motions. The Court first determined that no right to govern one's own appearance was recognized in the Ninth Circuit although substantial contrary authority existed in other jurisdictions. Despite the contradictory Affidavits regarding the justification for the Marine Corps hair and wig regulations and despite the invidious classifications based upon sex, the District Court then upheld the regulations as being rationally based upon the historical roles given to the different sexes in the functioning of the military.

2/ Finding that jurisdiction existed under 28 U.S.C. § 1331(a), the Court declined to consider whether jurisdiction could be predicated on 28 U.S.C. § 1361, 28 U.S.C. § 1346(a)(2), or 5 U.S.C. §§ 702 and 703.

Petitioners then filed a timely notice of appeal and sought from the District Court a stay pending appeal. On March 14, 1974, the District Court granted a partial stay and reinstated the Temporary Restraining Order insofar as it applied to weekend drills. No relief was provided regarding the upcoming summer camps. On April 2, 1974, however, the stay was substantially narrowed so as to allow only the wearing of short-hair wigs at weekend drills, to prohibit the wearing of such wigs at summer camp training and to allow further discipline and punishment of those male Marines whose hair was deemed by Respondent Beaughler to be impermissibly long. By a further order dated April 8, 1974, the District Court vacated the March 14 order nunc pro tunc April 2, 1974.

Petitioners filed an application for

a stay with the Court of Appeals for the Ninth Circuit, and that application was denied on May 17, 1974, by Circuit Judges Koelsch and Hufstedler. Petitioners then filed an application for a stay of the order with the Honorable William O. Douglas, Circuit Justice for the Ninth Circuit. Justice Douglas referred this application to the entire Court which denied the application on June 3, 1974.

The Court of Appeals for the Ninth Circuit affirmed the District Court order on June 23, 1975. Adhering to its earlier position that no recognizable constitutional rights were at issue, the Court of Appeals found that Respondents had sufficient authority to enforce hair-length regulations against Reservists for the reasons stated in their conclusory affidavits. On September 19, 1975, Mr. Justice Douglas granted Petitioners an

extension of time to and including November 6, 1975, in which to file their Petition for Certiorari in this Court.

REASON FOR GRANTING THE WRIT

I.

THE DECISION BELOW PRESENTS SIMILAR ISSUES TO, AND IS INCONSISTENT WITH, THE DECISION IN BARRY V. DWEN, NO. 74-1269, CERTIORARI GRANTED MAY 27, 1975.

The Court of Appeals for the Ninth Circuit has declined to find that individuals have a constitutionally-protected right to regulate their own appearance which may be set aside only upon a proper showing of justification by the interfering governmental body. Affirming the District Court order granting Respondents' motion for summary judgment in this case, the Court stated plainly: "[W]e have held that an individual reservist possesses no constitutional right to choose his own

hair style as against military regulations and that the military has a right to govern its affairs without untoward intervention from the judiciary. Agrati v. Laird, 440 F.2d 683 (9th Cir. 1971)." 519 F.2d, at 1307. Rejecting an earlier challenge to school hair-length regulations based on the First Amendment, the right to privacy and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court had stated: "We do not believe that plaintiffs have established the existence of any substantial constitutional right which is in these two instances being infringed." King v. Saddleback Junior College District, 445 F.2d 932, 940 (9th Cir. 1971). In fact, the District Court in this case distinguished "the many cases supporting the plaintiffs' position," Slip. op., p. 4, by stating: "The first distinction

is in the refusal of the Ninth Circuit to recognize a constitutional right to wear one's hair as one wishes [citing King v. Saddleback Junior College District, supra]." Slip. op., p.4.

This Court has before it a case from the Court of Appeals for the Second Circuit taking an opposite view. In Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973), a case involving similar hair regulations applied to uniformed policemen, the Second Circuit stated: "The first, third, fourth, seventh, and eighth circuits have held that the Constitution limits the state's right to regulate the personal appearance of its citizens. We agree." Id. at 1130. The Court noted that "[a]n increasing number of courts have recognized the right of an individual to style his own appearance," though reaching that view under a variety of rationales, and

concluded that "choice of personal appearance is an ingredient of an individual's personal liberty" protected by the due process guarantees of the Fifth and Fourteenth Amendments. Id. at 1130. That position, of course, is directly inconsistent with the position adopted by the Court of Appeals for the Ninth Circuit.

Since the Ninth Circuit recognizes no constitionally-protected right to regulate one's own appearance, it stands to reason that virtually any justification offered by the Marine Corps in support of their hair-length regulations is routinely accepted in that circuit. The nature of the Corps' burden is tellingly demonstrated by this case where the Court of Appeals approvingly cited affidavits from two Marine Corps officers reciting possible justifications in merely conclu-

sory fashion. No hearing was held to test the reliability or weight of these statements and Respondents' position, therefore, rests upon the barest of records. It may also be noted that the Marine Corps' extensive listing, by affidavit, of justifications for a no-wig policy is at best inconsistent with its stipulation in an earlier case that "the short hair wigs worn by the plaintiffs to reserve unit meetings are safe and present no health hazard, and do not interfere with the tasks required to be performed by the plaintiffs while on duty." See Miller v. Ackerman, 488 F.2d 920, 922 (8th Cir. 1973). While the Corps may be entitled to crawfish on this issue, it is difficult to see why their more recent position should be accepted without any fresh scrutiny whatsoever.

The Court of Appeals for the Second

Circuit, after recognizing the constitutional right denied by the Ninth Circuit, ruled that "at trial, the Commissioner has the burden of establishing a genuine public need for the regulation." Barry v. Dwen, supra, at 1131. The same burden should be imposed upon the Marine Corps in this case. Therefore, Petitioners urge this Court either to grant this petition and set it for argument or to hold the petition pending resolution of Barry v. Dwen.

II.

THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS AND DISTRICT COURTS AND SUBJECTS PETITIONERS TO DIFFERENT STANDARDS THAN THOSE GOVERNING MARINE CORPS RESERVISTS IN OTHER JURISDICTIONS.

Application of military hair-length regulations to Reservists has occasioned

substantial litigation during the past five years. Initially focusing on the regulations themselves, the cases have increasingly focused on whether compliance with regulations can be achieved through use of short-hair wigs. Perhaps the most definitive statement that can be made about the cases at present is that they are hopelessly in conflict.

The Courts of Appeals for the First and Eighth Circuits have come down squarely on the Reservists' side. In Friedman v. Froehlke, 470 F.2d 1351 (1st Cir. 1972), the Court reversed a grant of summary judgment for the defendants and against three members of the Massachusetts Army National Guard. The Court defined the issue before it as "whether the Guard may require reservists, whose time spent in military duty is but a very small fraction of the time spent in civilian pursuits, to

conform to Army hair-cut requirements," 470 F.2d, at 1352, and concluded that it may not. The Court stated: "[I]nsofar as members of the reserve are concerned, who, under their contracts, are allowed to work and live in civilian society for most of the time, the right to wear their hair as they please is not so trivial as to be denied without any service-connected reason." 470 F.2d, at 1353. The Court then rejected the justifications advanced by the Government as insufficient.[3/]

The Court of Appeals for the Eighth Circuit has taken an equally strong position. Affirming two District Court deci-

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3/ The District Court in Friedman found "that short-hair wigs cannot be detected and that they are not easily dislodged." 470 F.2d, at 1353. The Court of Appeals refused to accept the argument that activation of the Reserves would be hampered by use of wigs, terming it "mere assertion." The Court of Appeals was also unimpressed by the claim that wigs would interfere with gas-mask training.

sions in favor of the Reservists, the Court stated: "This circuit in Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971), has recognized the constitutional right of an individual to style his own appearance without arbitrary interference by the government." Miller v. Ackerman, 488 F.2d 920 (8th Cir. 1973). The Court then noted with approval the decision in Dwen v. Barry, supra: "In so doing, we have joined the First, Second, Third, Fourth, and Seventh Circuits in recognizing 'that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation. Dwen v. Barry, 483 F.2d 1126, 1130 (2nd Cir. 1973)." Id. at 922. The Court agreed that no such legitimate interest had been set

forth in that case.[4/]

Other federal courts have reached similar conclusions. See, e.g., Harris v. Kaine, 352 F.Supp. 769 (S.D.N.Y. 1972); Garmon v. Warner, 358 F.Supp. 206 (W.D.N.C. 1973); Good v. Mauriello, 358 F.Supp. 1140 (W.D.N.Y. 1973); Hennig v. United States, 385 F.Supp. 1138 (N.D. Ill. 1974); Klinkhammer v. Richardson, 359 F.Supp. 67 (D. Minn. 1973). While no court, of

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4/ The Court of Appeals stated:

> "The record is void of demonstrating such interests. In essence, the only reason extended for the proscription is that the Marine Corps thinks it is good for the spirit of the Corps. However, the record shows that the wigs worn are neat and presentable. Moreover, there is no demonstration that the wigs in any way inhibit the reservists' performance or that they affect discipline or training." 488 F.2d, at 922.

course, has determined that the right to govern one's appearance or the right to select appropriate means (short-hair wigs) to satisfy limiting regulations is absolute, these courts have agreed that the reasons offered by military authorities in support of short-hair regulations or no-wig policies are inadequate to override the competing constitutional rights. By contrast, the Ninth Circuit has recognized no constitutional rights at all and has thus, not surprisingly, accepted without appropriate scrutiny the justifications rejected by numerous other courts.

The Ninth Circuit's position is unfortunately not unique. Other courts faced with similar challenges by Reservists have upheld the government's position on a variety of rationales. See, e.g., Baugh v. Bennett, 350 F.Supp. 1248 (D. Ida. 1972); Comunale v. Mier, 355

F.Supp. 429 (W.D. Pa. 1973); Martin v. Schlesinger, 371 F.Supp. 637 (N.D. Ala. 1974). The result, therefore, is that Marine Reservists in certain jurisdictions may wear short-hair wigs and remain in compliance with Marine regulations. The Marine Reservist who does so in the Ninth Circuit risks call-up for two years of active service. This condition is obviously both impractical and inequitable.

III.

THE DECISION BELOW IS INCORRECT AS A MATTER OF LAW AND DEPRIVES PETITIONERS OF CONSTITUTIONALLY-PROTECTED RIGHTS.

The discussion in the preceding pages has set forth Petitioners' belief that the decision below deprived them of significant rights protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. That discussion will not be repeated here.

Numerous decisions of this Court have recognized that citizens possess important, though at times indefinable, personal rights which may not be curtailed without proper justification. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). Petitioners ask for recognition of similar rights in this case.

Petitioners have also contended throughout this litigation that the Marine Corps' differing policies regarding hair length and wigs for men and women violated their rights to equal protection. While the regulations applicable to men specify maximum hair lengths and have been interpreted to prevent the use of wigs as a means of compliance, the regulations applicable to women set forth far differ-

ent standards. Thus women are allowed, for example, to have hair which touches the collar and may wear wigs which "look natural and conform to all of the above listed regulations."

This Court has made clear that differential treatment between men and women will be subject to searching judicial scrutiny. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Taylor v. Louisiana, ___ U.S. ___ (1975). While the Court has not yet placed sex classifications squarely within the special category of suspect classifications, Stanton v. Stanton, ___ U.S. ___ (1975), the trend of recent decisions is that real, rather than merely imaginative, reasons must be set forth for denying to one sex rights extended to the other. Sex discrimination will

no longer be condoned on the basis of "'archaic and overbroad' generalization[s]." Weinberger v. Wiesenfeld, supra.

The Court of Appeals for the Ninth Circuit declined to examine closely the sex classification in this case, stating that "recent Supreme Court decisions indicate that only a rational relationship between legitimate governmental interests and the sex classification need be found. Stanton v. Stanton, [supra]; Weinberger v. Wiesenfeld, [supra]; Schlesinger v. Ballard, 419 U.S. 498 (1975)." 519 F.2d, at 1309. The Court of Appeals noted as support for the classification in this case that "women Marines do not train for combat, operate heavy equipment, wear gas masks, scale obstacles or operate mine detector units." Id., at 1309. No inquiry was made, of course, into whether those

distinctions themselves were compatible with equal protection notions. Nor was there any evidence in the record, apart from the affidavits previously discussed, to support the premise that wigs are a hindrance to performance of such duties. The Marine Corps, in fact, stipulated to precisely the opposite conclusion in Miller v. Ackerman, 488 F.2d 920 (8th Cir. 1973). See page 24, supra.

The decision below, therefore, denies Petitioners significant personal rights and subjects them to treatment inconsistent with the treatment accorded women Marines. There is no basis in the record for such treatment and the decision below should be reversed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals

for the Ninth Circuit.

Respectfully submitted,

By /s/
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STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

DOROTHY ANN RYAN, being first duly sworn on oath, deposes and says:

That she deposited in the United States mail box with Air Mail postage prepaid, three (3) copies of the Petition for Writ of Certiorari addressed to:

Solicitor General
Department of Justice
Washington, D. C. 20530

Dorothy Ann Ryan
DOROTHY ANN RYAN

SUBSCRIBED AND SWORN to before me this 4th day of November, 1975.

Peggy C. Boling
Notary Public

My Commission Expires:
April 25 1977

FILED
FEB 19 1974
U. S. DISTRICT COURT
DISTRICT OF ARIZONA
BY _____ DEPUTY CLERK

Appendix "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DAVID KENT CAMPBELL, Lance Corporal, U. S. Marine Corps Reserve; JAMES E. CHORAK, Lance Corporal, U. S. Marine Corps Reserve; TED C. McANICH, Lance Corporal, U. S. Marine Corps Reserve; and HANK WOODRUFF, Lance Corporal, U.S. Marine Corps Reserve, Plaintiffs, vs. MICHAEL J. BEAUGHLER, Captain, U. S. Marine Corps Reserve, Commanding Officer, Company D, 6th Engineering Battalion, FMF, U. S. Marine Corps Reserve, Defendant.	No. Civ-73-750 Phx WEC O R D E R

Plaintiffs are members of the United States Marine Corps Ready Reserve. They are seeking injunctive and declaratory relief in this challenge to a Marine Corps Regulation which prohibits the wearing of short hair wigs.

Jurisdiction is asserted under 28 U.S.C. §1331(a), 28 U.S.C. §1361, 28 U.S.C. §1346(a)(2), and 5 U.S.C. §§ 702 and 703. This Court will assume jurisdiction under 28 U.S.C. §1331(a) and decline to consider the other possible sources of jurisdiction. See Friedman v. Froehlke, 470 F.2d 1351 (1st Cir. 1972) and Garmon v. Warner, 358 F.Supp 206 (W.D.N.C. 1973).

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Pursuant to Marine Corps Order P1020.34B, male members of the Corps must meet the following standard for grooming of the hair:

* * * *

b. Hair shall be worn neatly and closely trimmed. It shall be clipped at the sides and back so as to present an evenly graduated appearance. The hair on top must not be over 3 inches in length. Long or conspicuous sideburns are prohibited."

A further regulation was enacted, effective November 1, 1973, prohibiting the use of short hair wigs as a means of complying with the above standard.

As members of the Ready Reserve, plaintiffs are required to attend 48 scheduled drills during each year and to serve on active training duty for not less than fourteen days each year. 10 U.S.C. §270(a). If there is a failure to satisfactorily complete the training as required by §270(a), the plaintiffs are subject to being called to active duty for either forty-five days or two years. 10 U.S.C. §§ 270(b) and 673 (a).

Plaintiffs allege that, as a result of their wearing short hair wigs, defendant has threatened to give them unsatisfactory ratings, thus, making the plaintiffs candidates for induction into the active service.

The regulation prohibiting short hair wigs is challenged as being violative of the Due Process Clause of the Fifth Amendment, and of plaintiffs' constitutional rights of expression and privacy. This Court is asked to permanently enjoin the defendant from enforcing the regulation, and, also, to declare that the regulation is constitutionally invalid. Defendant has countered by moving for summary judgment relyin

upon the right of the military to regulate those matters which are legitimate areas for military control without being subject to judicial review. See Orloff v. Willoughby, 345 U.S. 83 (1953).

Plaintiffs contend that the regulation in question is in violation of the Due Process Clause of the Fifth Amendment in that it creates an arbitrary and unreasonable classification based upon sex. Another Marine Corps regulation is cited which permits female members to wear wigs in an attempt to comply with the hair grooming standard for women, therefore, according to the plaintiffs, a situation of invidious discrimination toward males is created. As support for this argument plaintiffs cite the recent United States Supreme Court case of Frontiero v. Richardson, 411 U.S. 677 (1973), which held unconstitutional an Air Force Regulation which distinguished between male and female officers in the provision of allowances for dependents.

The Court does not accept plaintiffs' contention that classifications based upon sex are, in light of Frontiero, inherently suspect, and thus subject to strict judicial scrutiny. Accord, Wiesenfeld v. Secretary of Health, Education and Welfare, 42 U.S.L.W. 2326 (D.N.J.1973) (3-judge panel decision). The regulation in question need only be rationally related to some valid public purpose. Reed v. Reed, 404 U.S. 71 (1971).

The present distinction is not arbitrary or unreasonable, but rather is the direct result of the historical roles given to the different sexes in the functioning of the military. See United States v. St. Clair, 291 F.Supp. 122 (S.D.N.Y.1968). It is recognized that men must provide the physical force behind the military operation while the female is relegated to the task of providing the support for this operation. The

need to engage in physical training on the part of the male and the dangers and inconvenience that might result from the wearing of a wig during this training are valid objectives for control. The regulation in question is rationally related to these objectives.

The next contention is that the regulation is violative of plaintiffs' rights of expression and privacy. This Court is aware of the many cases supporting the plaintiffs' position; however, in reviewing the cases from within this Circuit, the authority is contra.

The first distinction is in the refusal of the Ninth Circuit to recognize a constitutional right to wear one's hair as one wishes. King v. Saddleback Jr. College District, 445 F.2d 932 (9th Cir. 1971). Given this resusal, the following statement from Orloff v. Willoughby, 345 U.S. 83 (1953), appears to be particularly appropriate:

> "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Id. at 93.

In Garmon v. Warner, supra, the Court struck down this same Marine Corps regulation holding that it violated the reservist's constitutional right, as recognized by the Fourth Circuit, to wear his hair as he pleases. In balancing the interest of the military against this constitutional right, the Court indicated that the result might be different if the proof had shown that the wearing of the wig did interfere with military operations. Id. at 109-10. In the present case, where no constitutional right is recognized, the

military need only show that there is a rational justification for the regulation, thus, precluding a finding of an abuse of discretion. Garmon, supra, recognized that military regulations, if constitutional, have the force of law. Id. at 209.

Undisputedly, the military has the right to control the length of hair worn by its reservists. Agrati v. Laird, 440 F.2d 683 (9th Cir. 1971). It is but a short step to the position that the regulation of the means of achieving this control is also a legitimate military matter not subject to judicial review absent an abuse of discretion. Kentz v. Brown, C-73-0312 (N.D.Cal. 1973); Baugh v. Bennett, 350 F. Supp. 1248 (D.Idaho 1972).

IT IS ORDERED that defendant's motion for summary judgment is granted, and that plaintiffs' motions be denied.

DATED this 6th day of February, 1974.

United States District Judge

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APPENDIX "B"

David Kent CAMPBELL, Lance Corporal, U. S. Marine Corps Reserve et al., Plaintiffs-Appellants,

v.

Michael J. BEAUGHLER, Captain, U. S. Marine Corps Reserve, Commanding Officer, Company D, 6th Engineering Battalion, FMF, et al., Defendants-Appellees.

No. 74-1763.

United States Court of Appeals, Ninth Circuit.

June 23, 1975.

Reservists in Marine Corps brought action for declaratory and injunctive relief to restrain enforcement of the corps' hair length regulations. The United States District Court for the District of Arizona, Walter Early Craig, Chief Judge, granted defendants' motion for summary judgment, and plaintiffs appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that marine corps hairstyle regulations, which allowed women but not men to wear short-hair wigs, did not create an arbitrary and unreasonable classification based on sex.

Affirmed.

1. Armed Services ⇐25

Military hair length regulations are a rational exercise of regulatory power.

2. Armed Services ⇐25

An individual reservist possesses no constitutional right to choose his own hairstyle as against military regulations.

3. Armed Services ⇐3

Military has a right to govern its affairs without untoward intervention from the judiciary.

4. Constitutional Law ⇐224

Marine corps hairstyle regulations, which allowed women but not men to wear short-hair wigs, did not create an arbitrary and unreasonable classification based on sex and therefore did not deny equal protection.

Kenneth P. Reed, Phoenix, Ariz., for plaintiffs-appellants.

George B. Nielsen, Jr., Asst. U. S. Atty., Phoenix, Ariz., for defendants-appellees.

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OPINION

Before WRIGHT and CHOY, Circuit Judges, and SOLOMON, District Judge.*

EUGENE A. WRIGHT, Circuit Judge:

Appellants are enlisted reservists in the United States Marine Corps who refuse to comply with hair length regulations[1] and the Corps' interpretation of them. Captain Beaughler, also a reservist, is their commanding officer. All are part of the Ready Reserve, the members of which are required to attend 48 drills during each year and to serve on active training duty for at least 14 days of each year. Failure to complete the training satisfactorily subjects a member to a possible call to active duty of 45 days or two years.

Appellants claim that the haircut regulations coupled with the prohibition against men wearing wigs deny them their constitutional rights of privacy, of freedom of expression and equal protection of the laws. The last contention relates to the different regulations applicable to women in the Corps which allow them to wear wigs of a complying short hair style.

In the court below, the appellants sought declaratory and injunctive relief to restrain the enforcement of the Corps' regulation. Both parties moved for summary judgment, stating that there were no disputed questions of fact. The district court granted the defendants' motion. We affirm.

In support of the defendants' motion for summary judgment, Captain Beaughler by affidavit explained the nature of active duty training for ready reservists and the reasons for haircut regulations. He noted that the purpose of such training was to achieve combat readiness by strenuous physical activity, gas mask training, rope climbing, scaling of obstacles and observance of proper field sanitation. Wigs, he said, could present a safety hazard by preventing gas masks from sealing properly, by causing vision impairment, and by interfering with the wearing of close-fitting earphones in operating mine detector units. He noted the need to integrate the reservists into a single Corps with regular Marines, with common standards uniformly enforced. Discipline breaks down, he said, if reservists are allowed to wear wigs.

General Robert E. Cushman, Jr., Commandant of the Marine Corps, amplified some of these reasons. He emphasized in his affidavit the need for uniformity of physical appearance in identifying an individual combat Marine with his unit and his colleagues. If regulars and reservists are to work effectively together in mutual trust and confidence, the two-week training period which brings them together must duplicate so far as possible the conditions which they would face upon mobilization.

None of this was refuted in the identical affidavits of the appellants who said only that they knew of "no instance in which a short hair wig has been a hazard in connection with the military activities of reservists."

* Senior District Judge, of the District of Oregon

1. The Marine Corps Personnel Manual § 1101(10b) provides:

"Hair shall be worn neatly and closely trimmed. It shall be cupped at the sides and back so as to present an evenly graduated appearance. The hair on the top must not be over three inches in length. Long or conspicuous sideburns are prohibited."

[1-3] This court has held that hair length regulations are a rational exercise of regulatory power. *King v. Saddleback Junior College District*, 445 F.2d 932 (9th Cir. 1971). Moreover, we have held that an individual reservist possesses no constitutional right to choose his own hair style as against military regulations, and that the military has a right to govern its affairs without untoward intervention from the judiciary. *Agrati v. Laird*, 440 F.2d 551 (9th Cir. 1971).

Despite these authorities, and basing their argument on *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), plaintiffs argue that the Marine Corps hair style regulations, which allow women to wear short-hair wigs in order to comply with these regulations, create an arbitrary and unreasonable classification based on sex and, therefore, are unconstitutional. Plaintiffs urge us to subject the Marine regulations to the strict scrutiny applicable to inherently suspect classifications.

Plaintiffs' reliance on *Frontiero*, *supra*, is misplaced. Although a plurality of the Court in that case concluded that sex is an inherently suspect classification, the majority holding was that an Air Force regulation which distinguished between males and females for purposes of proving dependents' status is not rationally based when enacted solely to facilitate administrative convenience, and is, therefore, unconstitutional. Moreover, recent Supreme Court decisions indicate that only a rational relationship between legitimate governmental interests and the sex classification need be found. *Stanton v. Stanton*, — U.S. —, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975).

[4] The district judge properly believed that the safety and compatibility of Marine regulars and reservists are legitimate governmental interests and that a prohibition of wigs for men is rationally related to that objective. That this prohibition is rationally based is reinforced by the fact that women Marines do not train for combat, operate heavy equipment, wear gas masks, scale obstacles or operate mine detector units.

In view of the decision in *Schlesinger*, *supra*, and prior decisions of this court, we find that no constitutional issue[2] is presented either by the regulations prescribing hair length and style nor the interpretation by the Marine Corps which precludes the use of wigs by ready reservists at active duty training.

Affirmed.

2. A recent *en banc* decision in the Third Circuit in *Zeller v. Donegal School District Board of Education*, 517 F.2d 600 (3 Cir. 1975), raises serious doubts that hair length regulations pose any cognizable constitutional questions. That court's plurality opinion by Judge Aldisert says in part:

"[W]e determine today that the federal court system is ill-equipped to make value judgments on hair lengths in terms of the Constitution—whether an athletic code requiring that hair be 'neatly trimmed' would not pass muster, whether one putting the limit on hair twelve inches below the collar would pass, or whether one drawing the line at four inches below the collar would be more difficult of solution. A very real concern is that the decisional process not become, in the phrase of Justice Holmes, 'amorphous and growing out of a shifting foundation laid on morals or economics [or fads] so as to invite indiscriminate use [of] the courts in the name of either expediency or a private view of morality'—both of which take on color and shade from the eye of the beholder."

* * * * * *

"Having made a policy determination, it is important to underscore why we have drawn the line we have. In full recognition of the duty of federal courts to be receptive to claims for redress of constitutional infringements, we have ruled deliberately. We have acted because of a felt concern that the sturdy tree of the federal judiciary is in need of pruning if it is to remain strong and stand tall, protecting basic individual liberties against unconstitutional impingements. We are concerned that, if the trimming process does not begin somewhere, the tree may topple of its own weight; that the proliferation of claims with exotic concepts of real or imagined constitutional deprivations may very well dilute protections now assured basic rights. We have a genuine fear of 'trivialization' of the Constitution. If this should occur, some of the monumental accomplishments in defining fundamental human rights and liberties may be compromised, and the protections accorded those rights and liberties threatened."

At 605, 607.

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Supreme Court, U. S.
FILED
DEC 24 1975
MICHAEL RODAK, JR., CLERK

No. 75-680

In the Supreme Court of the United States

OCTOBER TERM, 1975

DAVID KENT CAMPBELL, ET AL., PETITIONERS

v.

MICHAEL J. BEAUGHLER, CAPTAIN, UNITED STATES MARINE CORPS RESERVE, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The petition for a writ of certiorari was not timely filed. The judgment of the court of appeals in this civil suit was entered on June 23, 1975. The time for filing a petition for a writ of certiorari was extended to and including November 6, 1975, by order of Mr. Justice Douglas dated September 19, 1975 (Pet. 2-3). The time for filing a petition was not further extended, and the petition was not filed until November 7, 1975.

The time limit specified by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

DOJ-1975-12